

JUN 7 2012

Federal Communications Commission
Office of the Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re)	
)	
MARITIME COMMUNICATIONS/LAND	)	EB Docket No. 11-71
MOBILE, LLC	)	File No. EB-09-IH-1751
	)	FRN: 0013587779
Participant in Auction No. 61 and Licensee of)	
Various Authorizations in the Wireless Radio)	
Services)	
)	
Applicant for Modification of Various	)	Application File Nos. 0004030479,
Authorizations in the Wireless Radio Services	)	0004144435, 0004193028, 0004193328,
	)	0004354053, 0004309872, 0004310060,
Applicant with ENCANA OIL AND GAS (USA),	)	0004314903, 0004315013, 0004430505,
INC.; DUQUESNE LIGHT COMPANY; DCP	)	0004417199, 0004419431, 0004422320,
MIDSTREAM, LP; JACKSON COUNTY	)	0004422329, 0004507921, 0004153701,
RURAL MEMBERSHIP ELECTRIC	)	0004526264, 0004636537,
COOPERATIVE; PUGET SOUND ENERGY,	)	and 0004604962
INC.; ENBRIDGE ENERGY COMPANY,)	
INC.; INTERSTATE POWER AND LIGHT)	
COMPANY; WISCONSIN POWER AND)	
LIGHT COMPANY; DIXIE ELECTRIC)	
MEMBERSHIP CORPORATION, INC.;)	
ATLAS PIPELINE – MID CONTINENT, LLC;)	
DENTON COUNTY ELECTRIC)	
COOPERATIVE, INC., DBA COSERV)	
ELECTRIC; AND SOUTHERN CALIFORNIA)	
REGIONAL RAIL AUTHORITY)	

To: Marlene H. Dortch, Secretary
Attention: Chief Administrative Law Judge Richard L. Sippel

ENFORCEMENT BUREAU'S BENCH BRIEF

1. By Order, FCC-12M-26 (ALJ, rel. May 23, 2012), the Presiding Judge directed the Enforcement Bureau (Bureau) and Maritime Communications/Land Mobile, LLC (Maritime) to "file Bench Briefs on their points and authorities" concerning the appropriateness of re-assigning from the Bureau to Maritime "the burden of coming forward with evidence and

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proving its compliance with Commission rules” on Issue (g) of the HDO concerning the nonconstruction of Maritime’s site-based authorizations and the discontinuance of their operation.¹ The Chief, Enforcement Bureau, by her attorneys, hereby submits the Bureau’s brief.

Introduction

2. The burdens of adducing evidence and of proof as to whether Maritime has failed to timely construct its site-based facilities or to maintain their operations in accordance Sections 1.955(a) and 80.49(a) of the Commission’s rules – Issue (g) – was initially assigned by the HDO to the Bureau.² Specifically, the HDO placed on the Bureau the burdens relating to (a) whether Maritime’s site-based facilities were constructed (*i.e.*, placed in operation) within two years of their grant, as required by Section 80.49(a)(3) of the Commission’s rules; and (b) whether operations of any of Maritime’s site-based facilities have been discontinued and whether such discontinuance is permanent pursuant to Section 1.955(a) of the Commission’s rules. However, as the record amply reflects, Maritime has repeatedly failed to produce relevant information to the Bureau during the discovery phase of this proceeding, thereby preventing the Bureau from meeting its burdens in this case and carrying out its statutory obligations in the public interest.³

3. More than four months ago, the Presiding Judge ordered Maritime to respond fully and completely to the Bureau’s interrogatories seeking the date each of Maritime’s site-based facilities were constructed and the current and historical operating status of each of its site-

¹ See Order, FCC-12M-26 (ALJ, rel. May 23, 2012). See also *Maritime Communications/Land Mobile, LLC*, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing, EB Docket No. 11-71, 26 FCC Rcd 6520 (2011) (HDO) at ¶ 62(g).

² See HDO at ¶ 70 (“the burden of proof shall be upon the Enforcement Bureau as to the issues at ¶ 62(a) - (1)”).

³ See Comments of the Presiding Judge at the May 22, 2012 prehearing conference, addressing the Bureau on Maritime’s failure to provide discovery responses: “[Y]ou . . . have no access to the information. You don’t have a clue.” (5/22/12 Transcript at page 632), “[H]ow the hell are you going to prove construction? He’s not giving you anything to show he’s done anything about construction.” (5/22/12/ Transcript at page 656).

based facilities.⁴ With “those essential fact questions still . . . unanswered,”⁵ the Presiding Judge now proposes shifting to Maritime the burden of proceeding with the introduction of evidence and the burden of proof on Issue (g). As the Presiding Judge properly recognizes, Maritime is the entity “responsible for lawful construction and operation of stations under its Commission licenses,”⁶ “has peculiar knowledge of the factual questions of construction, operation and current status of its many stations,”⁷ and “is the primary and best source of the relevant evidence.”⁸

4. As detailed more fully below, the record plainly demonstrates that Maritime has failed to respond fully and completely to the Bureau’s interrogatories related to Issue (g). Indeed, the Presiding Judge has repeatedly recognized on the record that Maritime’s responses to the Bureau’s interrogatories were either evasive or incomplete.⁹ Because Issue (g) is the only issue on which the parties are currently proceeding to trial,¹⁰ Maritime’s failure to produce the requested discovery has brought this proceeding to a standstill. The Bureau cannot complete discovery and proceed to trial without the information that Maritime alone possesses. Under such compelling circumstances, it is entirely within the Presiding Judge’s lawful authority *and* discretion to specify an appropriate “consequence,” including shifting the burdens to Maritime,

⁴ See Order, FCC-12M-7 (ALJ, rel. Jan. 27, 2012)

⁵ See Order, FCC-12M-24 (ALJ, rel. April 26, 2012).

⁶ See Order, FCC-12M-26 (ALJ, rel. May 23, 2012).

⁷ *Id*

⁸ *Id*

⁹ See Order, FCC-12M-22 (ALJ, rel. April 6, 2012); Order, FCC-12M-24 (ALJ, rel. April 26, 2012); Order, FCC-12M-26 (ALJ, rel. May 23, 2012)

¹⁰ A hearing on the other designated issues has been deferred pending consideration of a yet-to-be filed Petition for Extraordinary Relief by Maritime, predicated on the Commission’s *Second Thursday* precedent.

to ensure the efficient disposition of this proceeding.

Factual Background on Maritime's Discovery Deficiencies

5. On December 7, 2011, the Bureau, together with SkyTel,¹¹ filed "Joint Interrogatories to Maritime Relating to Nonconstruction and Discontinuance of Site-Based Operations."¹² This joint filing contained a series of interrogatories which collectively requested Maritime to provide the date each of its site-based facilities was constructed (Interrogatory No. 5) and the current and historical operating status of each of its site-based facilities, including whether these facilities are currently operating, and if not, why not and for how long operations have been discontinued (Interrogatory Nos. 13, 14, 15).¹³

6. By Order, FCC-12M-7 (ALJ, rel. Jan. 27, 2012), the Presiding Judge ordered Maritime to respond fully and completely to these interrogatories by February 6, 2012. Maritime's February 6, 2012 responses to these interrogatories, however, were neither full nor complete. Instead, many of Maritime's responses were cursory and evasive. In accordance with Section 1.323 of the Commission's rules, the Bureau properly filed a "Motion to Compel" on February 16, 2012.

7. On March 12, 2012, the Presiding Judge held a prehearing conference at which he directed the Bureau and Maritime to confer in an attempt to resolve outstanding discovery matters.¹⁴ During the telephone conversation that followed between the Bureau and Maritime, counsel for Maritime committed to producing the following information:

¹¹ "SkyTel" refers to Warren Havens, V2G, LLC, Telesaurus Holdings GB, Verde Systems, Intelligent Transportation & Monitoring Wireless, Environmental, LLC and Skybridge Spectrum Foundation

¹² See "Joint Interrogatories to Maritime Relating to Nonconstruction and Discontinuance of Site-Based Operations," filed on December 7, 2011.

¹³ See *id.*

¹⁴ See Order, FCC-12M-19 (ALJ, rel. March 12, 2012).

- Maritime agreed to confirm for each location of each of its site-based authorizations (1) whether it is currently operating (*i.e.*, on-the-air, transmitting a signal) and (2) whether it has been in continuous operation (*i.e.*, continuously on-the-air, transmitting a signal) since its construction.
- Maritime agreed to identify the locations it had referred to in previous responses for which operations had been “temporarily suspended” or “inactive for continuous periods of more than one year,” how long these locations had not been operating, and for what reason.
- Maritime agreed to confirm for each location of each of its site-based authorizations whether it is off-the-air (*i.e.*, not transmitting a signal) and if so, to explain how long it has been off the air, and for what reason.¹⁵

8. Regrettably, Maritime’s commitment to cooperate was short-lived. Maritime’s “Amended and Further Supplemental Response to Interrogatories” and “Errata and Additional Information Regarding Amended and Further Supplemental Response to Interrogatories,” filed on March 16 and 19, 2012, respectively, failed to include the information Maritime had agreed to produce. For many of its site-based facilities, Maritime indicated only that they are subject to a spectrum lease.¹⁶ It provided no information as to whether any of these facilities are actually operating, and if not, for how long and why. For other facilities, Maritime confirmed only that they were “capable” of operating,¹⁷ craftily avoiding the critical fact that whether a facility is *capable of operating* is entirely different from whether that facility is *actually* operating. Moreover, in a display of contempt for the Presiding Judge and the Commission’s hearing processes, Maritime conceded that, for many of its site-based facilities, it had ***not even bothered***

¹⁵ This agreement was memorialized in a letter from the Bureau to Maritime’s counsel. See Enforcement Bureau’s Status Report On Maritime’s Discovery Deficiencies And Request For Presiding Judge’s Intervention, filed March 20, 2012, at Exhibit A.

¹⁶ See Maritime’s Amended and Further Supplemental Response to Interrogatories (Amended Response), filed on March 16, 2012, at Revised Table 2 at Status Code “L” and Errata and Additional Information Regarding Amended and Further Supplemental Response to Interrogatories (Errata), filed March 19, 2012, at Revised Table 2 at Status Code “L.”

¹⁷ See Maritime’s Status Report on Discovery and Response to the Enforcement Bureau’s Request for the Presiding Judge’s Intervention (Status Report), filed on March 22, 2012, at page 7.

*to look for some of the requested information.*¹⁸ Specifically,

- In its March 16, 2012 interrogatory responses, Maritime stated that **“it does not affirmatively know the status of stations that it has not been able to visit.”**¹⁹ In the Revised Table 2 it attached to those responses and to which it referred in response to Interrogatory Nos. 13 and 15, Maritime identified 22 stations with Status Code “U – Maritime not sure of current operational status.”²⁰
- Maritime further conceded that, for “the stations listed with codes G or G1... for authority that [it asserts] is now wholly subsumed within the scope of Maritime’s geographic licenses ... [it] **has not attempted to verify the status.**”²¹ This accounted for an additional 108 stations.²²
- Maritime subsequently confirmed that **“it does not have sufficient information to allow it to swear under oath to the current operational status”** of its “U” stations or of its subsumed stations without conducting on-site evaluations – which it has refused to do.²³

9. Furthermore, as if the foregoing excuses for not providing the requested information were not enough, Maritime also represented to the Presiding Judge that it “lack[ed] the financial resources and staff to visit or otherwise verify the specific operational status of each of its [station] locations.”²⁴ In reliance on what he presumably viewed as a good faith claim of financial hardship, the Presiding Judge tried to accommodate Maritime. Thus, by Order, FCC-12M-22 (ALJ, rel. April 6, 2012), the Presiding Judge directed Maritime to submit financial

¹⁸ See Amended Response at response to Interrogatory Nos. 13 and 14.

¹⁹ See Amended Response at response to Interrogatory No. 13 on page 4 and at Revised Table 2, page 5.

²⁰ See Amended Response at Revised Table 2, page 5; Errata at Revised Table 2, page 5.

²¹ See Amended Response at response to Interrogatory No. 13 on page 5.

²² See Amended Response at Revised Table 2 and Errata at Revised Table 2.

²³ See Maritime’s Reply Per Order (FCC 12M-21) (Reply Per Order), filed on March 28, 2012, at page 6. See also Status Report at page 3: “[i]n response to inquiries regarding the current operational status of the subsumed incumbent licenses . . . Maritime . . . is not certain of their current status and has made no effort to verify their status.”

²⁴ See Amended Response, at response to Interrogatory No. 14 on page 5. See also Reply Per Order at pages 5 and 6, Status Report at page 5.

statements for each of Maritime's equity owners by April 16, 2012.²⁵ However, when it came time to comply with that directive, Maritime abruptly reversed course and abandoned its claim that it lacked the financial wherewithal to comply with the Bureau's discovery requests.²⁶ Instead, Maritime argued that it had already answered the disputed interrogatories and that any further investigation would not elicit relevant or useful information.²⁷

10. In yet another attempt by the Presiding Judge to provide Maritime with an opportunity to produce information to which the Bureau was entitled, by Order, FCC-2M-24 (ALJ, rel. April 26, 2012), the Presiding Judge directed the Bureau and Maritime to again confer in the hopes the parties would succeed in "(1) stipulating to all trial issues of fact and law that can be stipulated, and (2) stipulating to all discovery issues that are agreed."²⁸ The parties were unable to reach any agreement.²⁹

11. On May 22, 2012, the Presiding Judge held an additional prehearing conference concerning Maritime's discovery deficiencies, after which he again instructed the Bureau and Maritime to "reduce to Stipulation the operational status of Maritime's licensed stations, the dates of construction and commencement of operations as the Bureau has been seeking by a series of interrogatories."³⁰ Although the parties were able to agree to a limited Stipulation concerning several of Maritime's site-based facilities, the Bureau and Maritime could not reach

²⁵ See Order, FCC-12M-22 (ALJ, rel. April 6, 2012) and Addendum (ALJ, rel. April 11, 2012)

²⁶ See Maritime's Request That The Presiding Judge's April 16, 2012 Order (FCC12M-22) Be Vacated or Modified, filed on April 12, 2012, at page 7. Maritime specifically stated therein that it no longer asks "to be excused from responding to interrogatories based on its financial condition." *Id.*

²⁷ See *id.*

²⁸ See Order, FCC-12M-24 (ALJ, rel. April 26, 2012)

²⁹ See Enforcement Bureau's Status Report On Joint Stipulation With Maritime, filed on May 14, 2012

³⁰ See Order, FCC-12M-26 (ALJ, rel. May 23, 2012).

agreement on stipulations concerning the current and historical operational status of the remaining 60 site-based facilities or the dates of construction and commencement of operations for the facilities for which Maritime has not previously identified the construction date. To date, Maritime has provided no further information responsive to the Bureau's discovery requests.

Analysis

12. The Presiding Judge has provided Maritime with every reasonable opportunity to comply with his January 27, 2012 Order to respond fully and completely to the Bureau's interrogatories.³¹ Nevertheless, more than four months after this Order, despite two prehearing conferences, and multiple unsuccessful attempts by the Bureau to negotiate with Maritime concerning these outstanding discovery matters, the Bureau still has incomplete information on "(1) when the construction of each licensed facility was completed, and (2) which licensed facilities are currently in operation or not."³² By refusing to produce the requested information which unquestionably goes to the heart of Issue (g), Maritime has effectively hijacked this proceeding and stopped it dead in its tracks

13 Pursuant to Commission rules and precedent, the Presiding Judge has the discretion "to exercise independent judgment in managing the Commission's administrative litigation."³³ Indeed, the Commission has long held that the Presiding Judge "is empowered with broad discretion to conduct . . . proceeding[s] in the manner most conducive to fairness in light

³¹ See Order, FCC-12M-7 (ALJ, rel. Jan. 27, 2012).

³² See Order, FCC-12M-22 (ALJ, rel. April 6, 2012)

³³ *Twin Rivers Communication, Ltd.*, Memorandum Opinion and Order, FCC 88M-1941 (ALJ, rel. June 23, 1988) at ¶ 4, see also 47 C.F.R. § 1.243 (recognizing the presiding judge's delegated authority to "[r]egulate the course of the hearing")

of the particular circumstances of th[e] case.”³⁴ This is particularly true with “respect to discovery and evidentiary matters.”³⁵ Moreover, if a party fails to make a full and responsive answer to an interrogatory, Section 1.323 of the Commission’s rules, 47 C.F.R. § 1.323, specifically grants the Presiding Judge the authority to “specify any appropriate procedural consequences . . . which will follow from the failure,” including such severe consequences as adverse findings of fact and dismissal with prejudice.³⁶

14. Based on the record of Maritime’s continued failure to respond fully and completely to the Bureau’s interrogatories and the impact it has had on the proceeding to date, the Presiding Judge has proposed as a “reasonable consequence” assigning to Maritime the burdens of proceeding with the introduction of evidence and of proof on Issue (g). Generally, the burden of proceeding with the introduction of the evidence and the burden of proof are provided for in the designation order.³⁷ However, as has been previously recognized, “the Commission’s law or policy on the assignment of burdens is not an absolute one.”³⁸ Exceptions to the general rule have been made when one party has “peculiar knowledge of the operative

³⁴ *In re Wester-Baker Broadcasting Co.*, Memorandum Opinion and Order, 71 FCC 2d 333, 336 (April 10, 1979); see *In re Son Broadcasting, Inc.*, Memorandum Opinion and Order, 88 FCC 2d 635, 640 (Nov. 19, 1981) (“Under our Rules, the ALJ has broad discretion to regulate the conduct to the proceeding in a manner most conducive to fairness and efficiency”) See generally *In re Thomas W. Lawhorne Cam-Broadcasting, Inc.*, 7 FCC Rcd 13, 15 (Rev. Bd. 1992) (recognizing the presiding judge’s broad conduct vested in him in the conduct of the hearing proceeding), *Broadcast Data Corp. v. Kravetz Media Corp.*, 97 FCC 2d 650, 652 (¶ 5) (Rev. Bd. 1984) (quoting *RKO General, Inc.*, 48 FCC 2d 826, 827 (Rev. Bd. 1974)) (“It is well-established that the ALJ has broad power to regulate the course of a hearing, which power is ‘plenary’ and ‘invests him with great latitude’”).

³⁵ See *Metroplex Communications, Inc.*, Memorandum Opinion and Order, 2 FCC Rcd 4513, 4513 (Rev. Bd. 1987) (“Of course, a presiding officer has broad authority to regulate the course of the hearing, particularly with respect to discovery and evidentiary matters.”) (citations omitted)

³⁶ See 47 C.F.R. § 1.323(d)

³⁷ See 47 C.F.R. § 1.254

³⁸ *Twin Rivers Communication, Ltd.*, FCC 88M-1941 at ¶ 5.

facts.”³⁹ Here, the operative facts are peculiarly within Maritime’s knowledge. As the licensee, Maritime is uniquely situated to have information concerning “questions of construction, operation and current status of its many stations”⁴⁰ and, as such, the Bureau agrees with the Presiding Judge’s observation that Maritime “is the primary and best source” of this evidence.⁴¹

15. The Presiding Judge plainly has the authority to control the conduct and disposition of this proceeding.⁴² Moreover, he has the discretion to impose such severe consequences as adverse findings of fact and dismissal with prejudice for the type of discovery deficiencies that exist in this case – remedies far more punitive than what is contemplated here.⁴³ Thus, the Bureau supports the Presiding Judge’s proposal to assign the burdens of adducing evidence and of proof to Maritime – the party best situated to offer the pertinent facts.

16. Accordingly, the Bureau respectfully requests that the Presiding Judge exercise his lawful authority and discretion and issue an order assigning to Maritime the burdens of proceeding with the introduction of evidence and of proof on Issue (g). In this regard, the Presiding Judge’s order assigning such burdens to Maritime should further specifically state that Maritime will, as a consequence, have the obligations at hearing of demonstrating (a) that its site-based facilities were constructed (*i.e.*, placed in operation) within two years of their grant, as required by Section 80.49(a)(3) of the Commission’s rules; and (b) that its site-based facilities were not discontinued and, if they were discontinued, that such discontinuance was not

³⁹ See *In re Rem Malloy*, 5 FCC Rcd 3988, 398-89 (Rev. Bd. 1990) (assigning burden of proceeding and proof to party having unique knowledge), *TeleSTAR*, Memorandum Opinion and Order, 2 FCC Rcd 7352, 7353 (1987) (burden of proof properly placed on party with “peculiar knowledge of the operative facts concerning the alleged misconduct”).

⁴⁰ Order, FCC-12M-26 (ALJ, rel. May 23, 2012).

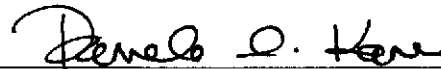
⁴¹ *Id.*

⁴² See, *supra* at notes 33-34.

permanent, pursuant to Section 1 955(a) of the Commission's rules.

Respectfully submitted,

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⁴³ See 47 C F R § 1.323(d); *Twin Rivers Communication, Ltd* , FCC 88M-1941 at ¶ 4

CERTIFICATE OF SERVICE

Makia Day, an Enforcement Analyst in the Enforcement Bureau's Investigations and Hearings Division, certifies that she has on this 7th day of June, 2012, sent by first class United States mail copies of the foregoing "ENFORCEMENT BUREAU'S BENCH BRIEF" to:

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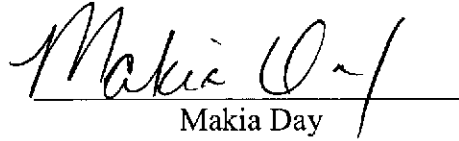
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That Maritime has engaged in conduct the effect of which is to unilaterally “throw a wrench” into the Commission’s hearing processes is plainly abhorrent and patently inconsistent with the public interest.